Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor

FEDERAL COURT (MELAKA) — CIVIL APPEAL NO 01-49-94
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHD DZAIDDIN FCJJ
3 APRIL 1997

Labour Law *— Employment — Termination of service — Employee of local authorities — Whether court could order reinstatement — Exceptions to the general rule that court would not order specific performance of a contract of service between master and servant*

Public Servants *— Dismissal — Dismissal of employee of local authority — Whether employees of local authorities are holders of public offices — Whether incorporation of General Orders into contract of service has the legal effect of making an employee the holder of public office — Federal Constitution art 132*

Local Government *— Employment — Market supervisor — Termination of services — Incorporation of the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 into the contract of service — Whether employees of local authorities are holders of public office — Local Government Act 1976*

The appellant who was employed by a local authority ('the first respondent') as a market supervisor was dismissed by the latter. The appellant sued the respondents for, inter alia, a declaration that his dismissal was void and of no effect, and that he was still a market supervisor, and entitled to all salary and benefits of his employment. Counsel for the first respondent raised a 'preliminary objection' to the appellant's claim for reinstatement. The objection was allowed and the whole claim of the appellant was dismissed with cost. The appellant appealed.

Counsel for the respondents argued that the appellant was an employee appointed under the Local Government Act 1976 and thus was not a public officer to be entitled to make a claim for reinstatement. The appellant submitted otherwise as the usual Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 ('the General Orders') applicable to public officers were made expressly applicable to the appellant and were used in dismissing him.

Held, allowing the appeal:

(1) The principle is that the court will not order specific performance of a contract of service between master and servant, except where: (i) a claimant/employee before an Industrial Court claiming for reinstatement on ground of dismissal without just cause or excuse under s 20 of the Industrial Relations Act 1967; and (ii) a holder of any public office as set out in art 132 of the Federal Constitution.

Employees of local authorities, such as the appellant, in general, are employed purely on a contractual basis and they are not holders of public offices as they are not under any category

under art 132 of the Federal Constitution. In the appellant's case, the incorporation of the General Orders into his contract of service did not have the legal effect of making him a holder of any of such public office as categorized under art 132 of the Federal Constitution. The parties could not confer on either of themselves, to be legally acceptable, a specific statutory status provided by a statute; in this case, art 132 of the Federal Constitution. A B

Therefore, the claim for reinstatement available to a permitted claimant in the Industrial Court or to a holder of a public office as categorized under art 132 of the Federal Constitution was not available to the appellant. The principle was applicable, and he was entitled to claim damages only if he could establish that his dismissal was in breach of his contract of service. The non-observance or non-compliance of the General Orders in the case of the supervisor herein was equivalent to a breach of condition of the contract of personal service of the supervisor, the condition being the use of such General Orders. The objection to the effect that the appellant could not claim the declarations that his dismissal was void and that he continued in office was correct and it was therefore correctly accepted by the learned judge who held, equally correctly, that it was not possible for the appellant herein to obtain reinstatement (see pp 366D–E, H–I, 367A–B, 368H–I, 370A–B, 371E–F and 372D). C D E

(2) In regard to the preliminary objection, there was no prior express agreement by the parties herein at the time it was raised that it would conclusively decide the whole case one way or another. That being so, in the context of issues in this case, and in view of the express relief sought in the statement of claim, in particular the claim for wrongful dismissal, the court below had gone too far in dismissing wholly the claim of the appellant (see p 372E–F). F

Obiter:

A clear distinction has to be made between a declaration that a dismissal is invalid and void on the one hand and on the other hand, a declaration that the dismissal is wrongful. The first-mentioned declaration may be granted by the court with what in effect is a reinstatement, ie that he continues in the employ, etc. The second-mentioned declaration is invariably granted with an order for damages only by virtue of the said principle (see pp 370I and 371A–B). G H

[Bahasa Malaysia summary

Perayu yang digaji oleh sebuah pihak berkuasa tempatan ('penentang pertama') sebagai penyelia pasar telah dipecat oleh penentang pertama. Perayu telah mendakwa penentang-penentang untuk, antara lain, suatu perisytiharan bahawa pemecatannya adalah tak sah dan tidak mempunyai kesan, dan bahawa dia masih seorang penyelia pasar, dan berhak kepada semua gaji dan manfaat penggajiannya. Peguam I

penentang pertama membangkitkan 'bantahan permulaan' kepada tuntutan perayu untuk pengembalian kedudukan jawatan. Bantahan dibenarkan dan keseluruhan tuntutan perayu ditolak dengan kos. Perayu membuat rayuan.

Peguam penentang-penentang berhujah bahawa perayu adalah seorang pekerja yang dilantik di bawah Akta Kerajaan Tempatan 1976 dan oleh itu bukanlah seorang pegawai awam yang berhak membuat tuntutan untuk pengembalian kedudukan jawatan. Perayu berhujah sebaliknya oleh kerana Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980 ('Perintah Am tersebut') yang biasa yang terpakai kepada pegawai awam dibuat terpakai secara nyata kepada perayu dan digunakan untuk memecatnya.

Diputuskan, membenarkan rayuan:

(1) Prinsipnya adalah mahkamah tidak akan memerintah pelaksanaan spesifik sesuatu kontrak perkhidmatan antara majikan dan pekerja, kecuali di mana: (i) pihak menuntut/pekerja di hadapan Mahkamah Perusahaan yang menuntut pengembalian kedudukan jawatan atas alasan pemecatan tanpa sebab atau alasan yang munasabah di bawah s 20 Akta Perhubungan Perindustrian 1967; dan (ii) pemegang mana-mana jawatan awam seperti yang dinyatakan dalam perkara 132 Perlembagaan Persekutuan.

Pekerja-pekerja pihak berkuasa tempatan, seperti perayu, pada amnya, digaji semata-mata atas dasar kontrak dan mereka bukanlah pemegang jawatan awam kerana mereka bukanlah di bawah mana-mana kategori di bawah perkara 132 Perlembagaan Persekutuan. Dalam kes perayu, penggabungan Perintah Am tersebut dalam kontrak perkhidmatan dari segi undang-undang tidak menjadikannya pemegang mana-mana jawatan awam sedemikian seperti yang dikelaskan di bawah perkara 132 Perlembagaan Persekutuan. Pihak-pihak tidak boleh mengurniakan ke atas diri sendiri, supaya boleh diterima secara sah, taraf statutori khas yang diperuntukkan oleh statut; dalam kes ini, perkara 132 Perlembagaan Persekutuan.

Oleh itu, tuntutan untuk pengembalian kedudukan jawatan yang boleh dibuat oleh pihak menuntut yang dibenarkan dalam Mahkamah Perusahaan atau oleh pemegang jawatan awam seperti yang dikelaskan di bawah perkara 132 Perlembagaan Persekutuan tidak terbuka kepada perayu. Prinsip itu adalah terpakai, dan dia berhak menuntut ganti rugi hanya jika dia dapat membuktikan bahawa pemecatannya melanggar kontrak perkhidmatannya. Ketidakpatuhan Perintah Am tersebut dalam kes perayu adalah sama dengan kemungkiran syarat kontrak perkhidmatan peribadi perayu, di mana syaratnya merupakan penggunaan Perintah Am seperti ini. Bantahan bahawa perayu tidak boleh menuntut perisytiharan bahawa pemecatannya adalah tak sah dan bahawa dia terus memegang jawatan adalah betul dan oleh itu telah diterima dengan betul oleh hakim yang arif yang memutuskan,

juga dengan betulnya, bahawa adalah tidak mungkin untuk perayu mendapatkan pengembalian kedudukan jawatan (lihat ms 366D–E, H–I, 367A–B, 368H–I, 370A–B, 371E–F dan 372D).

(2) Berhubung dengan bantahan permulaan, tiada perjanjian nyata terdahulu oleh pihak-pihak di sini pada masa ia dibangkitkan bahawa ia akan memutuskan keseluruhan kes secara muktamad walau apa cara pun. Justeru itu, dalam konteks isu-isu dalam kes ini, dan memandangkan relief nyata yang diminta dalam pernyataan tuntutan, khususnya tuntutan untuk pemecatan salah, mahkamah bawah telah melampaui kuasa dalam menolak tuntutan perayu secara keseluruhan (lihat ms 372E–F).

Obiter:

Perbezaan yang nyata harus dibuat di antara satu perisytiharan bahawa pemecatan adalah tak sah dan terbatal dari satu segi dan sebaliknya, satu perisytiharan bahawa pemecatan adalah salah. Perisytiharan yang pertama boleh diberikan oleh mahkamah yang pada hakikatnya adalah pengembalian kedudukan jawatan, iaitu dia meneruskan penggajian, dan lain-lain. Perisytiharan kedua selalunya diberikan dengan perintah untuk ganti rugi hanya disebabkan prinsip tersebut (lihat ms 370I dan 371A–B).]

Notes

For cases on employment in a local government, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 66–69.

For cases on dismissal of public servants, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1525–1563.

For cases on termination of service, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 836–868.

Cases referred to

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169 (refd)

Barber v Manchester Regional Hospital Board & Anor [1958] 1 All ER 323 (refd)

Howard v Pickford Tool Co Ld [1951] 1 KB 417 (refd)

Mahan Singh v Government of Malaysia [1978] 2 MLJ 133 (refd)

Ong Ah Chuan v PP [1981] 1 MLJ 64 (refd)

Quek Chek Yen v Majlis Daerah Kulai [1986] 2 MLJ 290 (refd)

Vine v National Dock Labour Board [1957] AC 488 (refd)

Legislation referred to

Federal Constitution arts 132, 135

Industrial Relations Act 1967 s 20

Local Government Act 1976

Public Officers (Conduct and Discipline) (Cap D) General Orders 1980

A Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)
Employment Protection (Consolidation) Act 1978 ss 69–71 [UK]
Trade Union and Labour Relations (Consolidation) Act 1992 s 236 [UK]

B **Appeal from**: Civil Suit No 21–34–90 (High Court, Seremban)

Christopher Fernando (*Haresh Mahadevan* with him) (*Aris Rizal Christopher Fernando & Co*) for the appellant.
Mazlinda Makhzan (*HC Yong* with her) (*Ng Wook Woon Andrew TC Saw & Co*) for the respondents.

C

Cur Adv Vult

Peh Swee Chin FCJ (delivering the judgment of the court): This appeal concerns the claim by a local government employee against the Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan and others for: D (a) a declaration that his dismissal by his employer as a market supervisor was void and of no effect and that he was still a market supervisor, and entitled to all salary and benefits; (b) an enquiry to determine the amount of his salary; (c) damages; and (d) costs, the appellant being such employee ('the supervisor') and the first respondent, his employer ('the local council').

E The complaint against the supervisor was that he had been absent without leave from 12–17 September 1984, and after some correspondence and enquiry between the parties, the supervisor was ultimately dismissed, whereupon the supervisor launched the civil suit concerned herein.

In the civil suit, the local council filed a summons under O 18 F r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('the RHC') for the statement of claim to be struck out on the grounds that it disclosed no reasonable cause of action; that it was frivolous or vexatious; or that it was an abuse of the process of the court. It was allowed and the claim of the supervisor was dismissed with costs, hence this appeal.

G At the hearing of the summons in the court below, learned counsel for the local council then appearing adopted an unusual way of proceeding with the summons by raising 'a preliminary objection' based primarily on the ground that the supervisor had no right to ask for the declarations that: (a) his dismissal was void; and (b) he still continued in his post. The learned counsel was in effect objecting to the supervisor's claim for H reinstatement to the latter's former post from which he was dismissed. We, of course, would treat such 'preliminary objection' as a misnomer for her submission in support of her application.

In point of fact, looking at the statement of claim, nowhere does it refer to the word 'reinstatement'; but in the second part of the declaratory I relief sought, there is the prayer that the plaintiff 'is still' a market supervisor and for the consequential relief as to salary, damages, etc. Learned counsel for the local council assumed the prayers mentioned as being synonymous with or equivalent to a prayer for a claim for reinstatement. Learned counsel for the supervisor, in answer to such submission, tacitly and completely accepted both as meaning the same thing.

In his submission, learned counsel for the supervisor submitted, inter alia, that his client was a public officer and that the usual 'General Orders' applicable to public officers were made expressly applicable to the supervisor and were used in dismissing him. Further, the State Secretary of Negeri Sembilan wrote the 'letter of dismissal' to the supervisor, signing as chairman of the disciplinary committee. He cited, in particular, *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169 (PC). He submitted further that even if the supervisor was not a public officer, he claimed the relief of reinstatement in any event.

On the other hand, learned counsel for the local council submitted, inter alia, that the supervisor was an employee (appointed) under the Local Government Act 1976 and the fact that the General Orders were adopted in this case did not make him a public officer. Such General Orders could be adopted.

A claim by an employee for reinstatement still has that ring of incongruity to make lawyers extremely wary, for they are always acutely aware of the principle that the law will not specifically enforce a contract of service between master and servant and that the master has always the power to dismiss him in breach of such contract without any danger of being asked or compelled to re-employ him, thus the only remedy left to the servant is to sue in damages. The principle is that the court will not order specific performance of a contract of personal service.

Following the principle aforesaid ('the principle'), the logical result will be that a dismissed employee cannot claim any declaration that 'his dismissal was void' and if he wants to cast his pleading in the form of a declaration, then he can claim a declaration, eg he was dismissed in breach of the contract of service and that he claims damages for such breach. To claim that his dismissal was void would indicate that he wants to have his job back. It is therefore understandable and it was quite natural for learned counsel to apply under O 18 r 19 of the RHC to strike out the statement of claim for such reinstatement, with the statement of claim claiming a declaration that 'he is still' market supervisor, with the clearest implication that his earlier dismissal is void or invalid.

It appears to us that to the principle, there are two exceptions.

The first exception is a permitted claimant/employee before an Industrial Court, claiming reinstatement, arrears of wages, etc on ground of dismissal without just cause or excuse. Such a claimant can present his case after the Minister of Labour decides to refer his case to that court when he thinks fit (see s 20 of the Industrial Relations Act 1967). The said Act has, of course, statutorily and radically, changed the common law with regard to such permitted claimants/employees for the sake of promoting national economic interest, industrial peace and conferring upon the ordinary workman benefits far beyond those that are available in the ordinary court. Apart from the Industrial Relations Act 1967, there may be some other statutes which may modify the principle, though not quite in a radical way like the said Act. It will be a matter of interpretation of the relevant provisions in such modifying statutes to find out in what precise ways the principle has been modified.

A The second exception is a holder of any public office of certain types. In Malaysia, fortunately for clarity or certainty, such public offices as spelt out or set out in art 132 of the Federal Constitution are as follows. They are public offices in the armed forces, the judicial and legal service, the general public service of Malaysia, the police force, the joint Federal and B State public services, the education service and finally the public service of each state. All holders of public offices above-mentioned, except the public service of each state, hold office during the pleasure of the Yang di-Pertuan Agong; and those who hold office in the public service of each state hold office, on the other hand, during the pleasure of the ruler of the state as the case may be.

C Holders of the said public offices enjoy special protection through the Federal Constitution as conferred by its art 135 which provides that no holder of such office, subject to legislation or subsidiary legislation enacted for carrying out such protection, shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard nor shall he D be so dismissed or reduced in rank by any authority subordinate to that other authority which has power to appoint him. There are, of course, rules of disciplinary procedure provided for the purpose.

We pause here to emphasize that such protection is special, because, in an ordinary contract of employment or personal service, an employee need not necessarily be given a reasonable opportunity of being heard E before such dismissal or reduction in rank because such an employee cannot ordinarily in law compel his employer to reinstate him to his former job and therefore exercising a right of being heard is an exercise in futility in so far as it is sought to prevent such dismissal.

Examples of dismissal of holders of such public offices are *Mahan* F *Singh v Government of Malaysia* [1978] 2 MLJ 133, concerning a Punjabi interpreter in the public service of the Federation; *B Surinder Singh Kanda* concerning an inspector of police and a host of other similar cases concerning holders of such public offices.

We may just as well mention that these public offices are more than G just jobs. The special protection under the modern view is for trying to preserve as far as possible the independence of the holders of these public offices against victimization by their superior officers or their political masters (see, eg, Malaysian Current Law Journal's 'Federal Constitution of Malaysia — A Commentary' (1986) at pp 394 and 395). In olden days, such a public office conferring such a status of being protected by law was H looked upon as a form of property, and in this connection, we set out below a passage from Prof Wade's *Administrative Law* (7th Ed) at p 557, dealing with the difference between a public office and a mere job as follows:

I > A line has to be drawn between an office which gives its holder a status which the law will protect specifically, on the one hand, and on the other hand, a mere employment under a contract of service. Offices used in old times to be looked upon as a form of property which could be held and recovered in specie: if the holder was wrongfully removed, he could obtain restoration by mandamus; or he might be granted prohibition or an

> injunction. Nowadays he can also obtain a declaration that his removal was void, and that he is therefore still in office, as was done in *Ridge v Baldwin* ([1963] 2 All ER 66), since this remedy likewise operates specifically. In other words, he is removable only by a due and lawful exercise of the power of removal, failing which he remains legally in office. A servant under a mere contract of service enjoys no such protection, according to a long established rule of law: whatever his contractual rights, he can always be dismissed and his remedy lies in damages for breach of contract. In other words, there is always a power to dismiss him, even though under the contract there is no right to do so. The principle is that one man will not be compelled to employ another against his will.

The special protection given by the Federal Constitution to such holders is in addition to a protection of the court which requires sufficient compliance, not only with the right to be heard but also with the other rule of natural justice, ie the rule against bias. In this connection, we remind ourselves of the statement of the veritably eminent Lord Diplock in *Ong Ah Chuan v PP* [1981] 1 MLJ 64 at p 71 that in a constitution based on the Westminster model, references to 'law' refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England.

If the dismissal of a holder of such public office is not sufficiently carried out in accordance with the rules of natural justice and the dismissal or disciplinary procedure enacted therefor, then the dismissal is ineffective or void. Logically, the post from which he has been purportedly removed remains intact for him and he therefore continues in office. In effect, from his employer's point of view, he is reinstated to his former post. The declarations commonly sought in court in connection with such dismissal are that his dismissal is void, that he continues in office and that he is entitled to arrears of salary, etc. If he succeeds in court with such declarations, he obtains reinstatement, a word which learned counsel in this case and others are wont to shy away from as if it were repugnant. We think also that in the case of the holders of these offices, it is perfectly in order.

In the instant case, the supervisor has been or was undoubtedly an employee of a local council. It was the local council that sent the letter of offer dated 11 March 1983 offering to him the post in question on its own behalf. It has never been disputed that this letter contained the terms and conditions of a contract of service which were unconditionally accepted by the supervisor.

Employees of local authorities are not holders of public offices holding office during the pleasure of the Yang di-Pertuan Agong or the ruler of any particular state, as the case may be, as they are not under any category under art 132 of the Federal Constitution except any employee in any local authority seconded from State Government or the Federal Government. In general, the employees of local authorities are employed purely on a contractual basis.

The Supreme Court in *Quek Chek Yen v Majlis Daerah Kulai* [1986] 2 MLJ 290 at p 292, quoted with approval, 16 *Halsbury's Laws* (4th Ed) at p 369 about employees of local authorities:

> Officers of local authorities are appointed on such reasonable terms and conditions as the authority thinks fit. Employees of national corporations are not in the position of civil servants and do not hold office at the pleasure of the Crown.

We now revert to consider the other inevitable aspect of this case, ie the terms and conditions on which the supervisor held his post, vide letter of offer dated 11 March 1983 from Pejabat Majlis Daerah and addressed to him. For the purpose of determining the relief of reinstatement (the only subject matter of the application to strike out the statement of claim), it would only be necessary, for the time being, to refer to para 2(e) of the letter which reads as follows:

> (e) Tuan/puan adalah setiap masa tertakluk kepada Perintah-Perintah Am Kerajaan, Pekeliling-Pekeliling dan lain-lain Arahan Pentadbiran yang dikeluarkan dari masa ke semasa mengenai kerja, kelakuan dan syarat-syarat perkhidmatan pegawai-pegawai dalam perkhidmatan awam; ...

It is clear that the supervisor's employment was subject to the General Orders, etc and that the words 'Perintah-Perintah Am Kerajaan ... mengenai kerja, kelakuan dan syarat-syarat perkhidmatan pegawai-pegawai dalam perkhidmatan awam' mean the General Orders of the government concerning the work, conduct and conditions of service of officers in the civil or public service. One takes note of the capital letters used in the words 'General Orders'. All holders of those public offices in the public service of the Federal or State Government, known popularly as government servants, know and have heard of 'General Orders' which refer, of course, in connection with disciplinary matters, to the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 ('the General Orders') which — though replaced now by some other similar regulations — would still apply to the present appeal. The General Orders (Cap D) were made expressly by the Yang di-Pertuan Agong in pursuance of power conferred by cl (2) of art 132 of the Federal Constitution. It is common ground that the letter of offer of appointment refers expressly in fact to such General Orders.

The General Orders were designed to give substance to the traditional degree of security of tenure to such holders of public offices who hold office during the pleasure of the Yang di-Pertuan Agong or the relevant ruler in respect of any conduct of the holder considered to be misconduct by the body that appointed him. Even though the supervisor was not such a holder of a public office as explained earlier, the General Orders had been incorporated into the contract of service of the supervisor with the local council, and the question then arises as to what would be the position regarding the said incorporation.

In our view, the position is that the incorporation of such General Orders into the supervisor's contract of service does not have the legal effect of making him a holder of any of such public office as categorized under art 132 of the Federal Constitution. Let us consider this from several angles.

Two parties to a contract cannot confer on either of themselves, to be legally acceptable, a specific statutory status, provided by a statute; in this case, art 132 of the Federal Constitution, the supreme statute. To contract out of statute normally means to waive a benefit conferred by a statute on one of the parties to a contract and this is permissible, given certain circumstances which it would not be necessary in this case to go into. In the present context, that the supervisor has no such benefit under any statute to waive is beyond doubt. To argue that the parties have contracted out of statute would have been a non-starter in this case.

Further, when the rights of the parties are regulated or governed by an ordinary contract of employment, the employee, not being a holder of public office, or where such rights are not modified or affected by any provisions of any statute, then, the fact that the dismissal of the employee is not in accordance with the procedure laid down in the contract does not prevent the dismissal from being effective to terminate the contract and the only remedy lies in damages. The employee cannot, in these circumstances, claim that the dismissal is void. A case in point for such modification by statute is *Vine v National Dock Labour Board* [1957] AC 488 (HL), in which a dock labourer — registered under a scheme embodied in the Schedule to the Dock Workers (Regulation of Employment) Order 1947 made under the Dock Workers (Regulation of Employment) Act 1946 of the United Kingdom — was sacked by the National Dock Labour Board and his appeal to a tribunal set up under the Act was dismissed. He sued in court, inter alia, for a declaration that his dismissal was invalid or void. The House of Lords held — on the facts and the statutory provisions contained in the said Act — that his dismissal was not valid; that his name was not validly removed from the register and that he continued in the employ of the National Dock Labour Board (despite the fact that the successful plaintiff there was not a holder of public office holding office during the pleasure of the Crown). The case was later expressly distinguished, however, in *Barber v Manchester Regional Hospital Board & Anor* [1958] 1 All ER 323 in which the plaintiff was a medical consultant, serving under a regional hospital board under the National Health Service Act 1946. He was wrongfully dismissed, in breach of such contractual obligations towards him and his appeal to the Minister was refused. He sued for, inter alia, a declaration that his employment had never been terminated and he was entitled to his salary up to the date of the writ. It was held, inter alia, that the contract between the plaintiff there and the Board was, in essence, an ordinary contract between master and servant and the plaintiff's remedy was only in damages. His claim for the declaration stated above was not allowed.

A clear distinction has to be made between a declaration that a dismissal is invalid and void on the one hand and a declaration that the

dismissal is wrongful on the other. The first-mentioned declaration may be granted by the court with what in effect is a reinstatement, ie that he continues in the employ, etc. The second-mentioned declaration is invariably granted with an order for damages only by virtue of the principle. When a dismissal is merely wrongful, at some risk of repetition, a plaintiff is left only with a remedy in damages by virtue of the principle. When a dismissal is void, or invalid, the dismissal that took place earlier never in effect, effectively took place because it is void, so the old job continues. To see things in their better perspective, let us say that a void or invalid dismissal is always wrongful, but not every wrongful dismissal is an invalid or void dismissal.

We may just as well add by way of further clarification that by virtue of the principle, an ordinary contract of employment as stated earlier above constitutes an exception to or a departure from the rule that a repudiation of a contract is not effective until the innocent party accepts the repudiation, in connection with which it should bring to mind the well-known dictum of Asquith LJ in *Howard v Pickford Tool Co Ld* [1951] 1 KB 417 at p 421 that 'an unaccepted repudiation is a thing writ in water ...'; to deny its existence as an exception in this regard and to attempt at the same time to rationalize such denial would only bring about uncertainty in the law.

In other words, the claim for reinstatement available to a permitted claimant in the Industrial Court or to a holder of a public office as categorized under art 132 of the Federal Constitution is therefore not available to the supervisor. The principle applies, and he is entitled to claim damages only if he can establish that his dismissal is in breach of his contract of service. The non-observance or non-compliance of the General Orders in the case of the supervisor herein is equivalent to a breach of condition of the contract of personal service of the supervisor, the condition being the use of such General Orders.

Before coming to the conclusion that the principle applies to the supervisor, we have already considered with care as to whether we should treat the supervisor's case as another exception (apart from the two exceptions aforesaid) to the principle explained earlier.

We feel that the policy of the law behind the principle is still very sound — that a person has the liberty to work for anybody he wishes without being compelled to do so — a liberty in any true democracy. Further, it is desirable that an employer, if he has no confidence in an employee, should not be compelled to employ or continue to employ him subject, of course, to the two exceptions aforesaid.

Now, if a workman or employee is aggrieved and seeking reinstatement, he does not have to face a cul-de-sac on his way to seeking such a reinstatement, he can try his luck in getting to the Industrial Court.

By adhering to the principle, it will continue to remain clear and to guide the legal profession and justify its hallowed place in law, a place it has occupied undisturbed for countless years. Incidentally, it has been confirmed by statute again in the United Kingdom by s 236 of the Trade

Union and Labour Relations (Consolidation) Act 1992 which provides that no court shall compel an employee to do any work by ordering specific performance of a contract of employment or by restraining the breach of such a contract by injunction. Even in the field of statutory intervention in changing common law to take account of changing industrial conditions and trade unionism, ss 69–71 of the Employment Protection (Consolidation) Act 1978 of the United Kingdom provide, in effect, that if an order of reinstatement made by the relevant employment tribunal is not complied with, the employer can, in the last resort, only be ordered to pay compensation.

In a contract to provide services — as distinct from a contract of personal service — more flexible rules apply. Thus, a contract to build may be specifically enforced if certain conditions are met. The distinction between a contract of personal service and a contract to provide services may one day be dealt with by this court, though it is not necessary to do so here.

In view of what has been said above, the objection of learned counsel to the effect that the supervisor could not claim the declarations that his dismissal was void and that he continued in office is correct and it was therefore correctly accepted by the learned judge who held, equally correctly, with respect, that it was not possible for the supervisor herein to obtain reinstatement.

We are, however, of the opinion that in regard to the 'preliminary objection', there was no prior express agreement by the parties herein at the time it was raised that it would conclusively decide the whole case one way or another. That being so, in the context of issues in this case, and in view of the express relief sought in the statement of claim — in particular, the claim for damages for wrongful dismissal — we think that the court below has gone too far in dismissing wholly the claim of the supervisor.

We therefore allow this appeal, set aside the order of the court below and dismiss the summon in chambers dated 5 November 1990 for striking out the statement of claim. We further order that the action herein be fixed for an early hearing to determine whether the appellant's dismissal was wrongful or improper; and if so, to assess damages, if any. We make no order as to costs here and below. The deposit of RM500 in court is to be refunded to the appellant.

Appeal allowed.

Reported by Wong Rhen Yen